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Recommended Citation

Frederic White, *The Ohio Sunshine Act: An Appraisal*, 16 Akron L. Rev. 243 (1982).

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THE OHIO "SUNSHINE" ACT: AN APPRAISAL

by

FREDERIC WHITE*

THE OHIO OPEN MEETINGS or "Sunshine" law has existed in its present form since November 28, 1975 [hereinafter the "Sunshine Law" or "The Act"].¹ So-called open meeting legislation is neither new or unique to Ohio. Indeed, every state has enacted one or more open meetings laws.² This article will examine the Sunshine Law to determine whether it has served its purpose, that is, making the processes of government more accessible to the citizens of the state of Ohio, and suggest some changes to increase the effectiveness of the legislation.

I. ACCESS TO GOVERNMENT

It has been stated succinctly that "America's heritage of English law does not include open government."³ Indeed, Parliament conducted its business in both houses behind closed doors. Although the original reason for this was said to be for the protection of the Crown from outside interference, it appears that the actual justification for Parliament's failure to provide outside information about debates and votes was to avoid revealing such information to its constituents.⁴

At both the federal and state levels, closed meetings concerned with substantive matters have been, more often than not, the norm:

In the United States, the House of Representatives has customarily met in public since its inception, and the Senate since 1794; most congressional work is now done in committee, however, and approximately one-third of the committee meetings have been closed in recent years. Thirty-

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¹See OHIO REV. CODE ANN. § 121.22 (Page Supp. 1982).

²See generally, OPEN MEETINGS: EXCEPTIONS TO STATE LAWS, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, (1979) [hereinafter referred to as ATTORNEYS GENERAL REPORT]. In addition to this report the ASSOCIATION also has published OPEN MEETINGS: TYPES OF BODIES COVERED, and will be publishing OPEN MEETINGS: ACTIONS AND MEETINGS COVERED. See also, Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361, 363-64 (1971); Note, *Open Meeting Statutes: The Press Fights for the 'Right to Know'*, 75 HARV. L. REV. 1199, 1214-16 (1962); Recchie & Chernoski, *Government in the Sunshine: Open Meeting Legislation in Ohio*, 37 OHIO ST. L. J. 497 (1976).

³Note, *The 'Open Door' Laws: An Appraisal of Open Meetings Legislation in Indiana*, 14 VAL. U. L. REV. 295, 297 (1980).

⁴CROSS, *THE PEOPLE'S RIGHT TO KNOW*, at 180 (1953) (citations omitted).

four of the states have constitutional requirements that the legislature meet in public; in the others legislative sessions are open as a matter of custom. Apparently no state, however, has a *constitutional* requirement of open meeting applicable to any governmental body other than the legislature (emphasis added).⁵

One Commentator, attempting to make a case for the need for open-meeting laws has stated:

Our society firmly believes, on the one hand, that the right to participate in our democracy includes the right to be informed. The people can and have no real power without factual knowledge of what their government is doing to and for them. To be well-informed, the public should have some access to the ongoing process of decision making; not only to what is done, but also to why it is done and what alternatives are considered and rejected. A truly democratic electorate vitally needs to know this information.⁶

Some have argued that there is a constitutional right to access to information about governmental procedures but this argument has been countered with the observation that the Bill of Rights was framed not as a guarantee to access to sources of information but rather as an attempt to deny prior restraints on publication.⁷

Perhaps one of the best reasons for openness in government has been expounded by the National Association of Attorneys General:

Another reason for the public policy of openness is that corruption, conflict of interest and the influence of special interests are frustrated by public scrutiny. Public officials are more responsive to the public will when the considerations upon which official action is based are publicly known, and, in turn, the possibility of citizen input at various stages of the decision-making process will help public officials be more cognizant of, and responsive to, the public will. Public understanding of the competing considerations facing the governmental body on any issue may facilitate public acceptance of often difficult and unpopular but necessary decisions. Openness also facilitates better reporting by the press of the governmental process, which, after all, is the means by which the vast majority of citizens follow the machinations of government. Finally, proponents of these laws hope that opening the governmental process to public scrutiny will restore public confidence in government.⁸

⁵Note, *supra* note 2, at 1203-04. The Sunshine Law, incidently, does not cover gathering of the Ohio General Assembly. See OHIO REV. CODE ANN. § 121.22(B)(1) (Page Supp. 1982).

⁶Wickham, *Let the Sun Shine! Open Meeting Legislation Can Be Our Key To Closed Doors In State And Local Government*. 68 NW. U. L. REV. 480, 481 (1973).

⁷See Note, *supra* note 2, at 1203-04.

⁸ATTORNEYS GENERAL REPORT, *supra* note 2, at 2.

Thus it appears that there are innumerable reasons for the establishment of open meeting laws; whether the Sunshine Law serves to promote these reasons is another matter.

II. HISTORY OF THE SUNSHINE LAW

The Sunshine Law was originally enacted in 1954.⁹ In its initial form it applied only to boards and commissions of state agencies and authorities.¹⁰ It prohibited such entities from taking any formal action at executive sessions,¹¹ provided for the taking and recording of minutes¹² and specifically excluded parole or pardon hearings held at penal institutions by pardon and parole commissions from the provisions of the Act.¹³

The first version of the Act was clearly limited in scope in that there was neither coverage of meetings and other official gatherings of local government units nor any provision for notice of such meetings or gatherings to interested members of the public. Additionally, there was no provision under the terms of the initial version of the Act for any penalties for the failure to observe it. Clearly, no meeting is really "open" if the public does not know that it will take place. Moreover, even if public notice is given, if it is done in such a manner as to in effect be no notice at all, the spirit of any open meeting legislation will be frustrated.¹⁴

The Sunshine Law was amended in 1955 to include within its scope boards and commissions of local political subdivisions.¹⁵ No notice or penalty provisions were added, however, leaving the law with little practical effect. The third amendment¹⁶ to the Act came in 1961; it was merely cosmetic and provided no substantive changes.

The year 1975 brought sweeping changes to the Sunshine Law. It was substantially amended, even its tone was changed. For example, the original Act, as amended, never contained a preamble. Perhaps to show that it "meant business" the Ohio General Assembly provided in the 1975 amendment to the Act that it was to be "... liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings"¹⁷

Besides the liberal construction provision, the most important portions of

⁹1954 OHIO LAWS 534 [OHIO REV. CODE ANN. § 121.22 (Page Supp. 1982)].

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*See generally*, Note, *supra* note 2, at 1207-08; Note, *supra* note 3, at 320-23.

¹⁵1955 OHIO LAWS 303 [OHIO REV. CODE ANN. § 121.22 (Page Supp. 1982)].

¹⁶1961 OHIO LAWS 582 [OHIO REV. CODE ANN. § 121.22 (Page Supp. 1982)].

¹⁷OHIO REV. CODE ANN. § 121.22(A) (Page Supp. 1982).

the Act provide for detailed definitions of "public body"¹⁸ and "meeting";¹⁹ set up a detailed notice of meeting procedure for all public bodies coming within the purview of the Act;²⁰ specifically set out the types of "executive sessions" which would be excluded from the Act's coverage;²¹ invalidate any "formal action of any kind" if such formal action was not adopted in any open meeting or resulted from deliberations in a meeting that was not open to the public;²² and provide for the removal from office of any member of any public body who has failed to act in compliance with the Act's provisions after an injunction had been issued against such person.²³

Theoretically, the Act, as amended, is much tougher than it was in its original form. Whether, as a practical matter, the amended Act is doing the job for which it was established must be examined.

III. COVERAGE OF THE ACT

Essential to the understanding of the application of the Sunshine Law is the definition of "public body" which, according to Ohio Revised Code Section 121.22(B) (1), means "any board, commission, committee, or similar decision making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, agency, authority, or similar decision making body of any county, township, or other political subdivision or local public institution." "Meeting" is defined as "any prearranged discussion of the public business of the public body by a majority of its members."²⁴ A close examination of these two definitions reveals some subtle yet troublesome issues.

It is clear that any committee which has as its members a majority of the members of the public body will have its meetings covered by the Sunshine Law. In addition, it is also axiomatic that a meeting of a "committee of the whole" will be included as a meeting of the public body itself. It is not obvious, however, whether, for example, a meeting of a three member committee of a seven person council comes within the scope of the Sunshine Law. Furthermore, if the language contained in Ohio Revised Code Section 121.22(B) (1), "similar decision making body," relates back to the word "committee" it is not unambiguous whether such a committee is a decision making body in a sense that a council or board is. Moreover, the Act does not make clear what "decision making" really means. If, for example, a committee's action stands as final without further action by the parent body then its actions would seem to be covered by the Sunshine Law. On the other hand, if a committee's action

¹⁸OHIO REV. CODE ANN. § 121.22(B)(1) (Page Supp. 1982).

¹⁹OHIO REV. CODE ANN. § 121.22(B)(2) (Page Supp. 1982).

²⁰OHIO REV. CODE ANN. § 121.22(F) (Page Supp. 1982).

²¹OHIO REV. CODE ANN. § 121.22(G) (Page Supp. 1982).

²²OHIO REV. CODE ANN. § 121.22(H) (Page Supp. 1982).

²³*Id.*

²⁴OHIO REV. CODE ANN. § 121.22(B)(2) (Page Supp. 1982).

must still be acted upon by a legislative body then the committee's role is only advisory in nature and arguably should not be covered.

Ohio case law does not lend much assistance in the determination of the Act's coverage. In *Curran v. Board of Park Commissioners*,²⁵ a common pleas court found that a county park board was a government unit and, as such, subject to the provisions of Ohio Revised Code Section 121.22. A recent court of appeals case, *County Commission of Piqua v. The Piqua Daily Call*,²⁶ while holding that the Sunshine Law generally applies to a charter city, also found that the Act did not and could not amend the home rule provision of the Ohio Constitution which alone resolves the question of the power of local self government under a city charter; nor did it expand or limit the power of the city commission under its charter. *Piqua* went on to hold that Ohio Revised Code Section 121.22 could not be interpreted so as to dictate to the city charter commission or assembly when, how, where and under what circumstances either might meet, adjourn, or hold executive meetings.²⁷ Since *Piqua* is not an Ohio Supreme Court case it is not clear what ramifications it has for the future status of the Sunshine Act. Nonetheless, *Piqua* seemingly invites charter municipalities to skirt the Sunshine Law.

Two cases, *Dayton Newspapers v. City of Dayton*²⁸ and *Maser v. City of Canton*,²⁹ perhaps best illustrate the evolution of the courts' thinking with regard to the issue of the coverage of the Sunshine Law. In *Dayton Newspapers*, a newspaper publisher and its reporter sought a declaratory judgment and permanent injunction against the city of Dayton to prevent the city commission from denying both plaintiffs access to any city commission meetings. Relief for the plaintiff was denied by the Court of Common Pleas for Montgomery County and plaintiff appealed to the Court of Appeals for Montgomery County. In holding for the city of Dayton, the court of appeals found that when gatherings of the city commissioners were held in which no business was transacted but rather were in the nature of "conferences," such conferences did not constitute "meetings" within the meaning of a Dayton City Charter provision, a related ordinance or the Sunshine Law. This meant that both the news media and the public could be excluded from such "gatherings." In likening these gatherings to executive sessions the court stated:

The present issue, however, concerns gatherings of commissioners when no business is transacted; when, rather, they confer together and with each other; and when they collaborate in doing what may be called

²⁵22 Ohio Misc. 197, 259 N.E.2d 757 (C.P. Lake County 1970).

²⁶64 Ohio App. 2d. 222, 412 N.E.2d 1331 (Miami County, 1979). One article suggested that there was some doubt whether the Sunshine Laws applied to school boards. See *The Ohio Open Meeting Statute as applied to Public School Board Action: A Proposed Alternative*, 3 OHIO N.U.L. REV. 176 (1975). That question seems to have been put to rest. See *id.* at 177 n.9, 181 nn.27-30.

²⁷See *County Comm. of Piqua v. Piqua Daily Call*. 64 Ohio App. 2d at 226-27, 412 N.E.2d at 1335.

²⁸28 Ohio App. 2d 95, 274 N.E.2d 766 (Montgomery County, 1971).

²⁹62 Ohio App. 2d 174, 405 N.E.2d 731 (Stark County, 1978).

their "homework." It is important that they do so freely and without restraint. Like all who have the responsibility of making important decisions, they need an opportunity to express, exchange and test ideas, to deliberate freely, off the record, and without the restraint of outside influence. Freedom of discussion in the exchange of ideas is essential to an understanding of a problem. It cannot be satisfactorily accomplished under a spotlight or before a microphone.³⁰

Further, this court added that even if the entire city commission met in the conduct of investigation, if no action was taken by the commission, neither the Sunshine Law nor the city charter provisions pertaining to open meetings would apply. This case was, however, decided prior to the 1975 amendments to the Sunshine Law. This reasoning is in contradiction to that of the 1975 provisions of the Sunshine Act which state that "a resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were specifically authorized in the statute."³¹ Additionally, this reasoning is in direct contradiction to the "liberal construction" provisions of the preamble to the Act.

In contrast to the *Dayton Newspapers* case, *Maser* held that a hearing by a three member standing committee of a fourteen member city council, pursuant to an ordinance authorizing the committee to conduct an investigation and subpoena witnesses concerning the operations, efficiency and moral of the police and fire departments, came within the provisions of the Sunshine Law.³² According to the *Maser* court:

[T]he mandate to make decisions as to what to find, what to conclude and to what to report the whole council clearly makes this particular police and fire committee, to the limited extent that it proceeds under a claim of authority of the particular ordinance before us, a 'decision making body' of a municipal incorporation and thus bound by the provisions of R.C. § 121.22.³³

This case should not stand for the proposition that any committee of a decision making body will necessarily have its deliberations come within the meaning of the Sunshine Law. It is to be noted that there was a specific mandate in this particular case from the Canton City Council to the committee directing the committee what to find, what to conclude and what to report to the whole council; such actions arguably made the committee not a "decision making" body so as to be covered by the provisions of the Act. If, however, such a toothless committee as was embodied in *Maser* is covered by the Act then the further away a committee gets from a so-called mandate of this par-

³⁰28 Ohio App. 2d at 97, 274 N.E.2d at 768.

³¹OHIO REV. CODE ANN. § 121.22(H) (Page Supp. 1982).

³²62 Ohio App. 2d at 179, 405 N.E.2d at 734.

³³*Id.*

ticular type the less apt such committee will come under the umbrella of the Sunshine Law.

IV. EXEMPTIONS OF SPECIFIC ENTITIES FROM THE ACT'S COVERAGE

The Act exempts specific entities from its coverage,³⁴ under specific circumstances allows the Ohio Development Financing Commission to close its meetings,³⁵ and provides for executive sessions.³⁶ Exclusion of certain governmental bodies from open meetings law coverage is not unusual; indeed, most governmental bodies do so.³⁷ Ohio Revised Code Section 121.22(D) excludes from the coverage of the Act both grand juries and adult parole authorities when their hearings are conducted at penal institutions for the sole purpose of determining paroles or pardons. In such cases it has been determined that secrecy is more important than informing the public. By establishing a specific exception from the open meeting laws for grand juries and adult parole authorities, Ohio has avoided the "except as otherwise" kinds of clauses which in many states' open meetings laws provide continuing authority for private meetings. With regard to such clauses, it has been stated:

The immediate effect of such a clause is to compound the problem for any citizen who wants to know whether he is legally entitled to observe the proceedings of a given governmental body. He must survey other statutes, ordinances and regulations to determine the location and extent of any pertinent exceptions.³⁸

By avoiding the foregoing type of language, Ohio has avoided that kind of problem.

While its vote to accept or reject an application for mortgage insurance must be held in an open meeting and is, therefore, governed by the Act, "in order to protect the interest of the applicant and the possible investment of public funds" the Ohio Development Financing Commission may by the

³⁴OHIO REV. CODE ANN. § 121.22(D) (Page Supp. 1982).

³⁵OHIO REV. CODE ANN. § 121.22(E) (Page Supp. 1982).

³⁶OHIO REV. CODE ANN. § 121.22(G) (Page Supp. 1982).

³⁷For a more detailed discussion of such specific exclusions, see generally, Note, *supra* note 2, at 1206-07; Wickham, *supra* note 6, at 483-87; Note, *supra* note 2, at 370-71; Note, *supra* note 3, at 309-12.

³⁸Wickham, *supra* note 6, at 484. An example of such a clause is VA. CODE § 2.1-343 (1973):

Except as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings. Minutes shall be recorded at all public meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly, (ii) legislative interim study commissions and committees, including the Virginia Code Commission, (iii) the Virginia Advisory Legislative Council and its committees, (iv) study committees or commissions appointed by the Governor, or (v) study commissions or study committees appointed by the governing bodies of counties, cities and towns, except where the membership of any such study commission or study committee includes more than one member of a three member governing body or involves more than two members of a governing body having four or more members. Information as to the time and place of each meeting shall be furnished to any citizen of this State who requests such information. Requests to be notified on a continual basis shall be made at least once a year in writing and include name, address, zip code and organization if any, together with an adequate supply of stamped self-addressed envelopes.

unanimous vote of all commission members present close the meeting.³⁹ During its closed meeting the Ohio Development Financing Commission may receive from the applicant, in confidence: (1) marketing plans; (2) specific business strategy; (3) production techniques and trade secrets; (4) financial projections; and (5) personal financial statements of the applicant or members of his immediate family including, but not limited to, tax records or other similar information not open to public inspection.⁴⁰ This provision is somewhat similar to the Act's executive session provision pertaining to the purchase or sale of property for public purposes.⁴¹

There is no mention in the Act of the General Assembly under the definition of "public body."⁴² In fact, the Ohio Constitutional provision which states: "[T]he proceedings of both Houses shall be public, except in cases which, in the opinion of two-thirds of those present, require secrecy . . ." ⁴³ indicates that the General Assembly, in effect, has constitutionally provided not only for its own "executive sessions," but also for no standards akin to those embodied under the provisions of Ohio Revised Code section 121.22(G) for determining when executive sessions should be held.⁴⁴ Such a provision allowing a legislature to have closed meetings where "secrecy" is required is not unusual.⁴⁵

While it seems that the Sunshine Law is clear in that it explicitly excepts from its coverage under certain circumstances grand juries, parole authorities and the Ohio Development Financing Commission, there have been, from time to time, questions raised about its coverage of other so-called governmental entities. For example, since the enactment of the Sunshine Law, the Ohio Attorney General has had to rule on whether entities such as the board of trustees of a comprehensive mental health center, the internal security committee established by the Industrial Commission and the Bureau of Workers' Compensation and the governing board of a community improvement corporation were "public bodies" and hence subject to the Act.

The Attorney General found the board of trustees of a comprehensive mental health center did not constitute a public body for purposes of Ohio Revised Code section 121.22.⁴⁶ The Attorney General's initial problem in classifying the board of trustees was his opinion that "it possesses certain features that are suggestible to public and private institutions."⁴⁷ In reaching the ultimate conclusion that Ohio Revised Code section 121.22 was not intended to cover

³⁹OHIO REV. CODE ANN. § 121.22(E) (Page Supp. 1982).

⁴⁰*Id.*

⁴¹OHIO REV. CODE ANN. § 121.22(G)(2) (Page Supp. 1982).

⁴²OHIO REV. CODE ANN. § 121.22(B)(1) (Page Supp. 1982).

⁴³OHIO CONST. art. II, § 13.

⁴⁴*See Note, supra* note 2, at 1203 n.31; *Note, supra* note 3, at 310 n.83.

⁴⁵*Id.*

⁴⁶1976 OHIO ATT'Y. GEN. OP. 2-209.

⁴⁷*Id.* at 2-210.

the board of trustees, the Attorney General concentrated on the "public officials to take official action" language of section 121.22(A).⁴⁸ After analyzing the question in connection with two Ohio Supreme Court cases⁴⁹ he concluded that "[a] public office must be created by law and the duties thereof defined by law. Moreover those duties must involve some exercise of the sovereign power."⁵⁰ The Attorney General went on to state that the position of an individual sitting on the board of trustees of a comprehensive mental health center did not qualify as a public office since such position was not created by any statute or ordinance but was derived from the corporate articles of the institution and that the management of the corporation did not involve any exercise of any portion of the sovereign power in the State of Ohio.⁵¹

In a 1978 Attorney General's opinion the finding that the Internal Security Committee, established jointly by the Industrial Commission and the Bureau of Workers' Compensation, was a public body within the meaning of the Act was based, in part, on the observation by the Attorney General that the Internal Security Committee was significantly different from the board of trustees considered in his 1976 opinion.⁵² Not only did the Attorney General find that the Internal Security Committee was statutorily created by a state agency and hence a "committee . . . of a state agency," but also, that it was a "decision making body" within the meaning of the Act.⁵³ In this opinion the Attorney General also reiterated the finding contained in section 121.22(A) that the Act was to be "liberally construed."⁵⁴ The Attorney General echoed this language in a 1979 opinion that found that the governing board of a community improvement corporation that had been designated as the agency of a county, a municipal corporation, or any combination thereof, pursuant Ohio Revised Code section 1724.10, constituted a public body for purposes of the Act.⁵⁵ It appears, therefore, that the question whether an entity is covered by the Act will be answered in the affirmative by the Attorney General if he concludes that the entity is created by statute or ordinance and its duties involve some exercise of the sovereign power.

⁴⁸*Id.* at 2-211.

⁴⁹*State ex rel. Milburn v. Pethel*, 153 Ohio St 1, 90 N.E.2d 686 (1950); *Herbert v. Ferguson*, 142 Ohio St. 496, 52 N.E.2d 980 (1944).

⁵⁰1976 OHIO ATT'Y. GEN. OP. 2-209, 2-211.

⁵¹*Id.*

⁵²1978 OHIO ATT'Y. GEN. OP. 2-144.

⁵³The Attorney General distinguished the Internal Security Committee from a subordinate agency or committee whose only function would be to make recommendations to its parent organization on the basis that the Committee was ". . . more than an informal advisory committee. It is a statutorily created, independent entity that performs expressly defined duties of an ongoing nature. As such, it differs fundamentally from an informal, *ad hoc* committee created by and for the convenience of a parent body." *Id.* at 2-146. In addition regardless of whether the Committee's decisions were termed "provisional" or were removed from the rights of the parties involved that they were nonetheless decisions and, hence, subject to the strictures of the Sunshine Act. Moreover, the Attorney General was further convinced that the Committee was a decision making body because it was vested with statutory authority to exercise certain sovereign powers.

⁵⁴*Id.* at 2-147.

⁵⁵1979 OHIO ATT'Y. GEN. OP. 2-203.

V. NOTICE

"Declaring a meeting open to the public means little if the public is not informed that a meeting is scheduled."⁵⁶ Indeed, in 1962 only six open meetings statutes provided for public notice of meetings.⁵⁷ Since 1962, however, most states have provided for notice provisions in their open meeting statutes.⁵⁸

The Sunshine Law provides, by rule, for reasonable methods whereby "any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings."⁵⁹ In addition, public bodies cannot hold special meetings unless they give twenty-four hour advance notice to the news media that have requested notification.⁶⁰ Even if there is an emergency requiring immediate official action the public body must notify the news media that have requested prior notification immediately of the time, place, and purpose of the emergency meeting.⁶¹ The Act also provides for advance notification to those who pay a reasonable fee of all meetings at which any specific type of public business has to be discussed.⁶² While the Act does not so indicate in specific terms it would appear that since public bodies must provide for notice by rule that those persons who wish to have notice of regular and special meetings probably should have access to the rules, and in turn, be able to challenge such rules if they are not in accordance with the Act itself.

Different jurisdictions have handled the notice problem in different ways. Unlike Ohio, some state statutes provide only for notice of "regular meetings and only to those persons who request such notice."⁶³ Ohio provides for a "reasonable method" of giving notice but does not define what such "reasonable method" should be. While the rule with regard to advance notification of all meetings at which specific types of public businesses may be discussed may be of some assistance to those who have a special interest, this rule does not assist the person who is simply interested in government generally. Therefore, not only is the Act remiss in not setting out an exact definition of a reasonable method of notice, it also is inadequate in that it does not provide that, at least as to special meetings, an agenda be provided. One commentator has stated that:

In a number of situations, notice of a meeting without some indication of the subject matter would be of little benefit to the public. Although

⁵⁶Note, *supra* note 3, at 320. This sentiment is echoed in Note, *supra* note 2, at 1207-08; Note, *supra* note 2, at 373.

⁵⁷Note, *supra* note 2, at 1207 n.10.

⁵⁸Note, *supra* note 3, at 320.

⁵⁹OHIO REV. CODE ANN. § 121.22(F) (Page Supp. 1982).

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³See Note, *supra* note 3, at 320; Tacha, *The Kansas Open Meeting Act: Sunshine on the Sunflower State?* 25 U. KAN. L. REV. 169, 182 (1977). For example, the Kansas Open Meeting Act, KAN. STAT. ANN. § 75-4318(b) (Supp. 1975) states: "Notice of the date, time and place of any regular meeting of any public body designated hereinabove shall be furnished to any person requesting such information."

the press might be interested in attending every meeting of a governing body, members of the public are likely to be more selective. If a statute is to truly serve the public needs, some notice of agenda as well as time, place and date should be required.⁶⁴

The Ohio Municipal League, in addition to drafting a short analysis of the Act at its inception, has also drafted a set of sample rules of notice.⁶⁵ These rules, if they are being used, may go a long way toward eliminating some of the vagaries created by the Ohio General Assembly in its failure to provide a definition of a reasonable method of notice.

The potential problems surrounding the Sunshine Law have not reached nearly the proportions predicted by public officials at its inception.⁶⁶ In addition, what litigation there has been has centered around the notice provisions embodied in Ohio Revised Code section 121.22(F). In addition, most of this litigation has had to do with the dismissal or, rather, the failure to renew the contracts of non-tenured teachers. Only four cases pertaining to the Sunshine Law have been decided by the Ohio Supreme Court since the 1975 amendments.⁶⁷ Only one, *Electrical Protection Association v. Public Utilities Commission*,⁶⁸ was directly concerned with the notice provisions of section 121.22(F). Because, however, that case is more pertinent to the enforcement provisions problems of Revised Code section 121.22(H) it shall be discussed under that subsection.

A recent Ohio case, *Amigo v. Board of Education*⁶⁹ dealt directly with section 121.22(F). In that case a local school district board of education determined at a regular meeting that the plaintiff's contract would not be renewed. The plaintiff was not personally served with notice of this meeting by the board of education.

Pursuant to statute the plaintiff was informed that her contract would not be renewed. She filed a complaint in the Medina County Court of Common Pleas alleging that the Board of Education's failure to notify her of the regular meeting at which a determination was made that her contract would not be renewed did not comply with the Sunshine Law and was, therefore, invalid. The trial court directed a verdict for the defendant Board of Education at the close of the plaintiff's case on the ground that the plaintiff had failed to state

⁶⁴Note, *supra* note 3, at 320.

⁶⁵See OHIO MUNICIPAL LEAGUE, MUNICIPAL GOVERNMENT IN OHIO (1980), at chapter 33, appendix A.

⁶⁶For example, one local elected official stated that the Sunshine Law was "' . . . overly-restrictive and endangers the validity of almost any ordinance a city could pass.'" Cleveland Press, Dec. 19, 1975, at B 8, cols. 5 & 6. The quote is from statements made by Sheldon Burns, a City of Beachwood Councilman. Certain Medina County elected officials stated that the law could in many cases "be interpreted to work hardships on officials." Cleveland Press, Dec. 15, 1975, at C 4, cols. 4 & 5. There is little evidence to indicate that either of these problems have occurred in any great numbers.

⁶⁷*Matheny v. Board of Education*, 62 Ohio St. 2d 362, 405 N.E.2d 1041 (1980); *State ex rel. Celebrezze, Jr. v. Court*, 60 Ohio St. 2d 188, 398 N.E.2d 777 (1979); *Electrical Protection Association v. Public Utilities Commission*, 50 Ohio St. 2d 169, 364 N.E.2d 3 (1977).

⁶⁸*Id.*

⁶⁹59 Ohio App. 2d 231, 394 N.E.2d 331 (1978).

a claim for which relief could be granted. Included among the trial court's findings were: (1) the board had adopted a notice rule pursuant to the Ohio Sunshine law; (2) the plaintiff had not requested the board to notify her of public meetings of the board; (3) that notice of the meetings of the board were not served upon the plaintiff since she had not requested them; and (4) that the plaintiff received copies of a newsletter sent to all teachers in the system which included a notice of the public meetings of the board. In affirming the trial court the Court of Appeals indicated that section 121.22(F) provided that personal advance notification of meetings was only to be given if a person specifically requested such personal notice and since the plaintiff had not requested such advance notification neither the Sunshine law nor the law governing the employment of non-tenured teachers indicated that she should have been given personal notice. The Court went on to add: "[T]he plaintiff could have, among other things, deposited a self-addressed envelope together with a written request to be notified of any meeting during which the renewal of her contract would be considered with the clerk."⁷⁰

While the foregoing is undoubtedly true, this case points out one of the major weaknesses of the Sunshine Law. On the one hand, Ohio Revised Code section 121.22(C) states that a public body is to provide a reasonable method whereby one may find the time and place of all regularly scheduled meetings. Because, however, the statute does not provide that a public body must indicate what the agenda will be at one of its open meetings, a person is put in the unenviable position of having to attend every regular meeting of a public body like a board of education with the idea that something might turn up concerning them personally. Does the Court of Appeals suggestion concerning the written request indicate that every non-tenured teacher must make such a request at the risk of not being in a position to protest if his or her contract is up for renewal at a meeting which they simply cannot attend? In addition, as the plaintiff in *Amigo* argued unsuccessfully, can it not be stated that the ability of a public employee to request a "public hearing under the provisions of section 121.22(G) (1) is a worthless one if there is no corresponding provision that necessitates that a public body give notice to the public employee that his employment situation is to be discussed at its next regular meeting? Since the *Amigo* case did not reach the Ohio Supreme Court, it is perhaps safe to assume that the Supreme Court either agrees with the reasoning of both the trial court and the Court of Appeals or simply is waiting for a better fact situation upon which to speak concerning the notice provisions of the Sunshine Law. Furthermore, *Amigo* does not seem to be an anomaly; various Ohio courts of common pleas have dealt with similar situations in which non-tenured teachers have had their contracts not renewed and have attempted to argue that such actions by the various boards of education involved were invalid because of a failure to comply with the Sunshine Law. The courts have been consistent

⁷⁰*Id.* at 236.

in disallowing such claims.⁷¹

VI. EXECUTIVE SESSIONS

The Sunshine Act specifically exempts certain confidential matters from its coverage by providing for executive or closed sessions. All states with open meeting laws provide, in some way, for the exemption of certain confidential matters from their coverage; all such statutes are not necessarily as specific as Ohio's.⁷²

The Sunshine Act provides that the members of the public body may hold an executive session only at a regular or special meeting for the sole purpose of considering (1) "appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a covered employee, official, licensee or regulated individual";⁷³ (2) the purchase or sale of public property if premature disclosure of information would give an unfair competitive or bargaining advantage to persons whose personal private interests is adverse to the general public interest;⁷⁴ (3) conferences with the public body's attorneys involving disputes that may involved pending or any court action;⁷⁵ (4) preparing for, conducting, or reviewing negotiations of bargaining sessions with public employees concerning their compensation or other terms or conditions of their employment;⁷⁶ (5) matters required to be kept confidential by federal law or rules or state statutes;⁷⁷ and (6) specialized details for security arrangements where disclosure of the matter discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law.⁷⁸

Like the notice provisions of the Sunshine Act most litigation concerning the executive session portion of the Act have had to do with the dismissal or

⁷¹Rossford Association of Classroom Teachers v. Brubaker, No. WO-77-61 (Wood County, 1978); Massie v. Warren Local Bd. of Educ. No. 488 (Washington County, 1978); Rockwell v. New Lexington City Bd. of Educ. No. CA-293 (Perry County, 1979); Hill v. Monroe County Bd. of Educ., No. 520 (Monroe County, 1979).

⁷²With regard to confidential records and related matters, it has been written that "Exceptions to open meeting laws for confidential matters generally provide that records required to be kept confidential by federal or state law may be considered in executive sessions. Some states have explicit provisions for such sessions while other states exempt confidential matters through statutory construction. Confidential matters relate to a variety of subjects. They include, but are by no means limited to, such topics as: medical, health and welfare records; the attorney-client privilege; labor negotiations; parole proceedings; licensing examinations; and an assortment of privileged information relating to individual privacy.

While most legislatures agree that certain confidential matters should be exempted from the requirements of open meeting laws, there is no singular interpretation to provide uniformity on the scope of such an exception." ATTORNEY GENERAL'S REPORT, *supra* note 2, at 72.

⁷³OHIO REV. CODE ANN. § 121.22(G)(1) (Page Supp. 1982).

⁷⁴OHIO REV. CODE ANN. § 121.22(G)(2) (Page Supp. 1982).

⁷⁵OHIO REV. CODE ANN. § 121.22(G)(3) (Page Supp. 1982).

⁷⁶OHIO REV. CODE ANN. § 121.22(G)(4) (Page Supp. 1982).

⁷⁷OHIO REV. CODE ANN. § 121.22(G)(5) (Page Supp. 1982).

⁷⁸OHIO REV. CODE ANN. § 121.22(G)(6) (Page Supp. 1982).

nonretention of secondary school teachers. In one case, *Matheny v. Frontier Local Board of Education*,⁷⁹ it was contended that section 121.22(G) (1)

. . . grants some form of public hearing to a nontenured teacher whose limited contract is about to expire, when so requested by the teacher. Alternatively, appellant argued that, at a minimum, when sought by the teacher this section requires that all discussion pertaining to renewal of a limited teaching contract must take place in open session. These arguments are not well taken.⁸⁰

The Supreme Court in *Matheny* based its decision upon these facts: (1) Ohio Revised Code Chapter 3319, applicable to school boards and teachers, did not require the school board to set forth reasons supporting its decision not to renew a limited teaching contract; (2) nowhere did Ohio Revised Code Chapter 3319 necessitate that the board of education had to provide teachers whose limited contracts are due to expire with the opportunity to be heard at the meeting where his reemployment was being considered; (3) the Ohio General Assembly in enacting section 121.22(G) (1) intended to leave undisturbed the provisions of Revised Code Chapter 3319 relating to teacher employment and Ohio Revised Code; and (4) Ohio Revised Code sections 3319.16 and 121.22(G) (1) both indicate that discussion matters concerning a teacher whose contract is to be terminated are to be private unless the teacher requests a public hearing.⁸¹

In an earlier case decided by the Supreme Court of Ohio prior to the 1975 amendment, *Beacon Journal Publishing Co. v. City of Akron*,⁸² a publishing company brought an action for declaratory judgment advising the company and the City of Akron whether various governmental bodies of that city could hold meetings closed to the public. The court held in a *per curiam* opinion that public bodies created by an act of the General Assembly were subject to the Sunshine Act; that boards appointed directly by the City Council without involving the mayor or chief administrator would or would not come under the purview of section 121.22 based on an examination of the act creating each and every such agency; and that the boards and commissions created by the executive office of the mayor and chief administrator were not subject to the provisions of the Sunshine Act.⁸³

⁷⁹62 Ohio St. 2d 362, 405 N.E.2d 1041 (1980).

⁸⁰*See id.* at 366.

⁸¹*Id.* at 366-68.

⁸²3 Ohio St. 2d 191, 209 N.E.2d 399 (1965).

⁸³*See id.* at 196, 209 N.E.2d at 403. It is interesting to note in this case that the Supreme Court of Ohio based a portion of its decision concerning the "sovereignty" of certain City of Akron boards and commissions on various portions of the Akron charter. For example, on page 197 of the opinion the court states: "The Health Commission, under the charter has full legislative power in all matters concerning the public health and sanitation and is not controlled by ordinances passed by the City Council. The Health Commission can provide its own rules for the conduct of its meetings." Of course, this statement was written prior to the 1975 amendments, but certain holdings concerning the impact of the Open Meeting Law on the conduct of the business of charter cities which were made after the 1975 amendment may indicate that the above quote is still viable. Such holdings will be discussed in the section of this paper concerned with charter cities.

The most widely recognized use of the executive sessions provisions in open meeting law is for personnel matters. According to a recent report at least 36 states offer this kind of exception and, the scope of these provisions vary greatly from state to state.⁸⁴ The *Attorney General's Report* offers two observations on the basis of the exception for personnel matters:

The legislature's determination that an employee's interest in protecting his or her personal privacy and reputation outweigh the public's right to observe personnel deliberations of a governmental body. A second reason proceeds from the belief that a government agency operates more efficiently when it is committed to organize and staff itself in private. From an administrator's perspective, it would be cumbersome and time consuming if every internal procedure dealing with individual employees were required to be open to the public. Furthermore, officials might hesitate to be publicly candid about prospective personnel or disciplinary proceedings because any criticism or charge could take on unintended personal tone and prove damaging to both the individual and the agency. Because so many states offer the option of executive session for personnel matters, it appears that there is a general agreement that a citizen's "need to know" does not outweigh the protection of personal privacy and the continuation of efficient internal management.⁸⁵

Some states, such as Florida, do not contain the personnel exception in their open meeting law. The Florida Supreme Court's disinclination to include the exception in the Florida open meeting law statute appears to be for the reason that the Florida law is regulatory in nature and deals with the power and discretion of certain governmental agencies and as such is not necessarily concerned with any rights or privileges of third parties dealing with such agencies. It is also the opinion of the Florida Supreme Court that personnel matters are neither sacred nor legally privileged, nor do they enjoy insulation from legislative control.⁸⁶ Clearly the Ohio General Assembly does not take the position on personnel matters that the Florida court does and the Ohio position is in conformity with the majority of jurisdictions.

Providing for the discussion of real estate transactions in executive session has had the effect of protecting the public interest by putting the public body in the same position as a private party in property negotiations.⁸⁷ The Act provides that the "... purchase or sale of public property is void if the seller or buyer of the public property has received covert information from a member that has not been disclosed to the general public in sufficient time for other

⁸⁴See ATTORNEYS GENERAL REPORT, *supra* note 2, at 21.

⁸⁵*Id.*

⁸⁶See generally, *Times Publishing Co. v. Williams*, 222 So.2d 470 (Fla. Dist. Ct. App. 1969).

⁸⁷Tacha, *supra* note 63, at 196. See also, ATTORNEY GENERAL'S REPORT, *supra* note 2, at 125, which indicates that over 30 states provide in their open meeting laws for executive sessions for public bodies for the discussion of the sale or acquisition of public property.

prospective buyers and sellers to prepare and submit offers.”⁸⁸ While it is presumably true that this section makes a good deal of sense in regard to the protection of the public purse, it is doubtful if there is any realistic method to ensure that the actions that are void will not be done. This is especially crucial since the statute provides if the minutes of the public body show that its meetings and deliberations have been conducted in compliance with the Act that “any instrument executed by the public body purporting to convey, lease, or otherwise dispose of any right, title, or interest in any public property shall be conclusively presumed to have been executed in compliance with this section.”⁸⁹

According to the Attorney General’s report:

The attorney client privilege in pending litigation provides one of the most widely recognized exceptions to open meeting laws. Approximately 27 states have exceptions that specifically permit discussion of litigation in executive session, and 8 states have in effect an exception for an attorney client discussion. In addition, a number of states recognize the attorney client privilege, even in the absence of an express statutory exception.⁹⁰

The Ohio Sunshine Act allowed executive session for conferences concerned with “pending or imminent” court action. The problem with this provision, however, is that it does not provide much of a guide for the determination of what “imminent” means. For example, is simply the oral threat of a law suit sufficient cause to close a meeting of a public body for the purpose of a conference with an attorney? In addition, does the meeting of a governing body and an opposing litigant in an effort to reach an out of court settlement qualify for the use of the executive session? Some state statutes are much more specific in delineating what kinds of attorney client conferences qualify for executive session.⁹¹ If it can be assumed that public bodies conducting collective bargaining negotiations would be placed at a decided disadvantage if their preparation and preliminary meetings had to be open particularly when those of their opponents did not have to be, it is probably no surprise that the Ohio Sunshine Act provides for executive sessions for labor negotiations.⁹² In addition, the Act provides for executive session for confidential matters as well as “specialized details of security arrangements for disclosure of the matters discussed might reveal information that could be used for the purpose of committing or avoiding prosecution for a violation of the law.”⁹³

VII. SANCTIONS

Ohio Revised Code section 121.22(H) provides that resolutions, rules or

⁸⁸OHIO REV. CODE ANN. § 121.22(G)(2) (Page Supp. 1982).

⁸⁹*Id.*

⁹⁰ATTORNEYS GENERAL REPORT, *supra* note 2, at 92.

⁹¹See Note, *supra* note 3, at 314-17. See also ATTORNEYS GENERAL REPORT, *supra* note 2, at 92-114.

⁹²OHIO REV. CODE ANN. § 121.22(G)(4) (Page Supp. 1982). For other discussions of the use of the executive session for labor negotiations, see ATTORNEYS GENERAL REPORT, *supra* note 2, at 115-24.

⁹³OHIO REV. CODE ANN. § 121.22(G)(5) and (G)(6) (Page Supp. 1982).

formal actions of any kind are to be invalid unless adopted in accordance with the provisions of the Act. The appropriate court of common pleas is empowered to issue an injunction to compel the members of the public body to comply with the provisions of the Act upon proof of a violation or a threatened violation. In addition any member of the public body who knowingly violates such injunction may be removed from office and action brought in the appropriate court of common pleas for the purpose by the prosecuting attorney or the attorney general.

The rather ominous tone of these provisions has already been severely blunted by a fairly recent Supreme Court of Ohio decision. In *Ohio Committee of the Central Station Electrical Protection Ass'n v. Public Utilities Commission*,⁹⁴ the Supreme Court held that "without a showing of concomitant harm or prejudice" it would not reverse an order of the Public Utilities Commission on the ground of violation of the Sunshine Law.⁹⁵ The difficulty with this decision is that no where in the Sunshine Act is there any language that indicates that a person charging a violation of the Act has to show "concomitant harm or prejudice." Rather, Ohio Revised Code section 121.22(H) seems to indicate that any violation of its provisions is enough to warrant an injunction. Such reasoning is bolstered by a reading of the beginning of the statute at section 121.22(A) which states that the Act is to be "liberally construed."

While the use of the injunction and removal from office sanctions are not unique to Ohio, such measures are by no means the only ones used in other states to attempt to force compliance with their respective open meeting laws.⁹⁶ Some use criminal sanctions, but there is some doubt whether criminal penalties do any good in helping enforcing of the law. For example, at least as of 1975, no cases have been found in any state where criminal penalties have been imposed.⁹⁷

In addition a recent article on the effect of imposing other than the civil sanctions provides a clear indication of why the Supreme Court of Ohio held as it did in the *Ohio Committee* case:

The new methods, too, have some defects, but they are at least reasonably related to the purpose of open meetings to the public. The problem with invalidation is that it is available only when an illegal meeting results in

⁹⁴50 Ohio St. 2d 169, 364 N.E.2d 3 (1977). See OHIO REV. CODE ANN. § 121.22(H) (Page Supp. 1982).

⁹⁵*Id.* at 174, 364 N.E.2d at 6.

⁹⁶For example, according to one recent article:

A variety of sanctions can be found in current open meeting laws. Most common appears to be the minor criminal penalty with the range of maximum fines running from \$25 to \$500, and a \$100 and/or 30-days provision being the norm. No existing legislation provides for liability in terms of civil fines. A number of acts simply prohibits final action or votes in closed session and imply that any action taken in violation of the statute will be considered void. Some statutes go on to provide expressly that the prohibited actions will be void, while other state that violation will not nullify any action taken. Some authorize enforcement by civil action with relief usually patterned after mandamus or injunction. Wickham, *supra* note 6, at 487.

⁹⁷See Tacha, *supra* note 63, at 197.

the taking of some final action by the company officials. It provides no remedy for illegal meetings involving only discussion. Injunctions, since they operate prospectively, provide a more satisfactory manner of enforcement, and the threat of contempt proceedings is likely to be sufficient deterrent for future violations. However, a problem with the injunction in some states has been a requirement that at the point at which the injunction is issued there must be a showing of prior illegal conduct. Moreover, injunctions against a meeting are only effective when there is advance knowledge that an illegal meeting is about to be held. Without such a leak, the only prospective remedy is to seek an injunction to prevent the carrying out of any decisions made or to seek invalidation of the decisions. Nothing can be done about what was discussed.⁹⁸

Courts in many states have been reluctant to invalidate final acts of governmental bodies. The recent Ohio Supreme Court case of *City of Moraine v. Board of County Commissioners of Montgomery County*⁹⁹ serves to illustrate this point. In that case the Cresses, appellees, owned real estate in Montgomery County which they leased to North Sanitary Landfill, Inc., also appellees, a corporation engaged in developing and operating landfills. The jurisdiction of the City of Moraine extended to the real estate. The appellees filed an application with the Montgomery County Rural Zoning Commission to change a zoning resolution of approximately eighty-one acres from a family residential district to a heavy industrial district. The zoning commission referred the application to the Montgomery County Planning Commission for review. After a public hearing the planning commission unanimously recommended approval of the change by the zoning commission. The recommendation was returned to the zoning commission for a public hearing and review; the zoning commission recommended denial of the application for the zoning change, and forwarded its recommendation to the Board of County Commissioners of Montgomery County. In May, 1978 the county commissioners held a public hearing on the application and the city of Moraine noted its exceptions. The zoning change was unanimously denied by the county commissioners.

The landfill company appealed the commissioners' decision to the Court of Common Pleas of Montgomery County pursuant to Ohio Revised Code section 2506.01 and prior to the trial asked the commissioners to reconsider their decision. The commissioners agreed, on the condition the court action be dismissed. A public hearing concerning the reconsideration of the zoning application was scheduled for the November 2, 1978, regular session of the commissioners, but the reconsideration was deferred until the November 9, 1978, meeting. The reconsideration was deferred at the time it was to be discussed. Prior to finally reconsidering their past decision the commissioners went into an executive session for the purpose of discussing "personnel matters." At the readjournment

⁹⁸Note, *supra* note 3, at 324.

⁹⁹67 Ohio St.2d 139, 423 N.E.2d 184 (1981).

of the public session, the zoning application was discussed and the Board completely reversed its prior decision.

The City of Moraine, as well as neighboring property owners, filed an appeal of the commissioners' decision with the Common Pleas Court. It upheld the approval as did the Court of Appeals for Montgomery County. Appellants appealed to the Ohio Supreme Court on two grounds: the zoning issue and an alleged Sunshine Law violation. The Ohio Supreme Court agreed with the lower courts that the Sunshine Law was not violated. It granted, with approval, the trial court's finding that

. . . the executive session was not a prearranged meeting outside of the public hearing wherein considered decision making concerning the land-fill rezoning took place. Moreover the intent of the Sunshine Law, that deliberations concerning public issues be made in public, could not be further served by invalidating a decision insofar as such deliberations were laid before the public eye.¹⁰⁰

The Court of Appeals similarly concluded: "[t]here is no evidence however that the Board of Commissioners arrived at its decision on the rezoning amendment through the non-public deliberations in executive session."¹⁰¹

The problem appears to be that there was no proof that personnel matters were not discussed, or, to put it another way, that the zoning was. The executive session was permissible under the statute and no one but the Board was present. The question arises as to the difficulty of proving a violation of Ohio Revised Code section 121.22(H) which would invalidate any "formal action of any kind" if such formal action was not adopted in an open meeting or resulting from deliberations in a meeting that was not open to the public. Since it is unlikely that anyone but those present at an executive session would know what was discussed, a finding of a violation is highly unlikely.

Invalidation often does nothing more than to force a re-run public vote, especially where the secret vote was unanimous. Additionally, invalidation can cause tremendous problems for governments when money is at stake, bonds issued, or contracts signed. The remedy might in some circumstances be far worse than the disease.¹⁰²

Finally, a situation which presents a far more insolvable dilemma than the prevention of Sunshine Law abuses in executive session is the proliferation

¹⁰⁰67 Ohio St.2 at 145, 423 N.E.2d at 188. See *State ex rel. Walsh v. Board of County Commissioners*, No. 75-M-697 (C. P. Geauga Cty. 1976).

¹⁰¹*Id.* But see *State ex rel. Printing Co. v. Hughey*, 2 OBR 449 (Common Pleas, Mahoning County, 1982), where the court granted an injunction against the Youngstown City Council's practice of holding prearranged discussions of city business without giving sufficient notice to the public. In that case, however, the court found clear evidence that the city council had violated the Act. Still, it is not certain how much an after the fact action like an injunction can have in a situation where the public officials may have already publicly acted on the affairs which they have privately discussed.

¹⁰²See Note, *supra* note 3, at 324-25.

of the so-called "teleconference." Public bodies are making increasing use of the so-called teleconference to meet quorum requirements and conduct business, long a private business practice.

No open meeting statute addresses the use of the teleconference call. The use of the teleconference call raises the obvious questions of monitoring and notice, as well as the more problematic one of authorization of specific individuals to take "action" over the phone wires. One public official has stated:

There is no precedent, no case law, to answer those questions. This is a developing area of the law. As long as the meeting is open to the public and the public can participate in the teleconference call, then there's no violation. The real question I have is whether business should be transacted at these meetings. There is a fundamental problem: If you have a person on the phone, you have a gnawing question in the back of your head, 'Is that really the person authorized to vote?' These are questions that should be addressed.¹⁰³

The impact of the use of the teleconference in the conducting of public business cannot be assessed at this time. Suffice it to say, however, that its use and growth is inevitable.

VIII. CHARTER MUNICIPALITIES AND THE SUNSHINE LAW

The holdings of the Supreme Court of Ohio in *Petit v. Wagner*¹⁰⁴ and *Leavers v. Canton*¹⁰⁵ both indicate that the Sunshine Law is not a matter of local self government and will thus be upheld at least as to non-charter villages and cities.¹⁰⁶ The real question therefore is if a charter city or village adopts a charter provision which contradicts the Sunshine Law, which enactment will prevail? *Leavers* seems to indicate that the conduct of a charter municipality's meetings is deemed to be a "power of local self-government" then the charter provision must be upheld over the statute.¹⁰⁷ On the other hand, the courts may decide to invoke the doctrine of "state-wide concern" so as to insure the supremacy of the Sunshine Law over any local meeting provision adopted by a charter municipality.

*Beacon Journal v. Akron*¹⁰⁸ involved a charter city, Akron, which had

¹⁰³Teleconferencing: Open Meeting Issues Raised, 68 A.B.A.J. 401 (April 1982).

¹⁰⁴170 Ohio St. 297, 164 N.E.2d 574 (1960).

¹⁰⁵1 Ohio St. 2d 33, 303 N.E.2d 354 (1964).

¹⁰⁶*Leavers* summarized the home rule power of local self government as follows:

1. An ordinance passed by a charter city which is not a police regulation and deals with local self-government can be at variance with a statute on the same subject;
2. A non-charter city has the same power so long as its ordinances are not at variance with state law; and
3. A non-charter city cannot enact an ordinance relating to local self-government that is at variance with statutory law on the same subject.

Id. at 37.

¹⁰⁷See *supra* note 102.

¹⁰⁸See *supra* note 82.

passed an open meeting ordinance. Since, however, the Supreme Court of Ohio did not find the ordinance, Section 133.01 of the Akron City Code,¹⁰⁹ to be in conflict with the Sunshine Law it never reached the question of what provision would prevail if there was a conflict. This case was, however, decided before the 1975 amendments to the Act. The issue of a conflict between the Act and a local charter municipalities' ordinance must, therefore, await future action by the Supreme Court.

IX. CONCLUSION

The first article analyzing the impact of the Sunshine Law concluded that ambiguities seriously flawed the statute, requiring revision by the General Assembly.¹¹⁰ A later article echoed this criticism, though somewhat more optimistically.¹¹¹ Much of the criticisms contained in those articles, printed almost twenty years ago, still holds true today.

No definitive study has been made on the effectiveness of the Sunshine Act nor have there been sufficient cases decided relating to the Sunshine Act which would indicate the courts' views of the Act's particular strengths and weaknesses. There is no empirical evidence that the Sunshine Act is being skirted by either charter or noncharter municipalities; perhaps it is simply too early to tell.

At any rate, the Sunshine Law represents a step toward more open and responsive government. Some problems of the Sunshine Law could be alleviated if the "similar decision making body" language of Ohio Revised Code section 121.22(B) (1) was clarified. In addition, the sanctions for violation of the Sunshine Law are virtually nonexistent; they should be strengthened. The real value of the Sunshine Law is its stated attitude of openness. This attitude, more than anything else, should insure that its benefits will outweigh any problems that might arise.

¹⁰⁹*Id.* at 192.

¹¹⁰Recchie & Chernoski, *supra* note 2, at 517.

¹¹¹Note, *supra* note 2, at 1219-20.

